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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 183

DAVID OSHER,

Petitioner,

v.

SELECTIVE SERVICE LOCAL BOARD NO. 6, VALLEY STREAM, NEW YORK; COLONEL WILLIAM H. BOUGHTON, DIRECTOR, NEW YORK STATE HEADQUARTERS SELECTIVE SERVICE SYSTEM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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David Osher,

Petitioner,

—v.—

Selective Service Local Board No. 6, Valley Stream, New York; Colonel William H. Bogaton, Director, New York State Headquarters Selective Service System,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner David Osher prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on May 1, 1969.

Opinions Below

The decision of the Court of Appeals, summarily affirming a denial of a preliminary injunction and granting a stay of induction pending appeal, is unreported, and appears on the Appendix, *infra*, p. 9. The decisions of the

District Court for the Eastern District of New York, initially granting a preliminary injunction, and then refusing to extend the said injunction, are unreported, and appear in the Appendix, *infra* p. 11 and p. 14 respectively.*

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1969. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Questions Presented

Petitioner is a graduate student in history at Columbia University and has been since 1965. He was deferred from training and service in the armed forces under Section 6(h)(2) of the Military Selective Service Act of 1967 and 32 CFR §1622.26(b). Upon returning his Selective Service Registration Certificate to the U.S. Government as part of a protest against the war in Vietnam, petitioner was on March 19, 1968, declared delinquent and reclassified 1-A, and subsequently ordered to report for induction. The case thus presents the same issues of law and fact as *Koldin v. Selective Service Local Board No. 4, Beltrami County, Minnesota*, No. 1175, petition for a writ of certiorari filed, 37 U.S.L.W. 3337 (March 19, 1969). Those questions are:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U.S.C. 460(b)(3)] preclude

* The case below was styled *Waigls et al. v. Selective Service Local Board No. , et al.* The title is changed here because only petitioner, one of the plaintiffs below, is filing this petition for certiorari.

judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

3. Do Selective Service Regulations 1617.1 and 1623.5, as construed and applied in this case, and Selective Service Regulation 1642.4 on its face, violate the First Amendment?

Statutes and Regulations Involved

Sec. 10(b)(3), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 560(b)(3) is set out in the Appendix, *infra*, p. 16.

Sec. 6(h)(2), Military Selective Service of 1967; 50 App. U.S.C. Sec. 546(h)(2), is set out in the Appendix, *infra*, p. 16.

Selective Service Regulation 1622.26; 32 C.F.R. Section 1622.26, is set out in the Appendix, *infra*, p. 18.

Selective Service Regulation 1642.4; 32 C.F.R. Section 1642.4, is set out in the Appendix, *infra*, p. 19.

Selective Service Regulation 1617.1; 32 C.F.R. Section 1617.1, is set out in the Appendix, *infra*, p. 19.

Selective Service Regulation 1623.5; 32 C.F.R. Section 1623.5, is set out in the Appendix, *infra*, p. 20.

Statement of the Case

Petitioner, on January 11, 1968, and at all pertinent times thereafter was a graduate student at Columbia University. He had been such since 1965, and was classified II-S. On January 11, 1968, at a news conference at the Overseas Press Club in New York, petitioner surrendered his Selective Service Registration Certificate, with the support of noted public figures, as a protest against the war in Vietnam (affidavit in support of order to show cause in District Court, R. 23*). His local draft board then declared him delinquent and reclassified him 1-A by a notice dated March 19, 1969, by reason of "failure to have registration card in your possession." On April 15, 1968, the present action was commenced on behalf of petitioner and other plaintiffs who do not now seek review here in the Eastern District of New York. That action alleged that the delinquency and reclassification of the plaintiffs was contrary to the Selective Service law and regulations, that it denied them due process of law and penalized the assertion of rights under the First Amendment.

Petitioner received a notice to report for induction on November 4, 1968. That induction was preliminarily enjoined on November 4, 1968, until ten days following the decision of this Court in *Oestereich v. Selective Service System*, which was then pending (Appendix, *infra*, p. 12). After the decision in that case 21 L.Ed. 2d 402 (December 16, 1968), the District Court refused to extend the injunction (Appendix, *infra*, p. 15) and an appeal was taken

* "R." refers to the numbered documents of the Record in the Court below, part of the Record filed with the Clerk of the Court.

to the Court of Appeals for the Second Circuit. The induction order of petitioner Osher was renewed for April 23, 1969 (Order to show cause for stay pending appeal, R. 36), he sought a stay pending appeal, and the respondents made a motion in the Court of Appeals for summary affirmance upon the authority of *Breen* v. *Selective Service System*, No. 1144, cert. granted 37 U.S.L.W. 3407 (April 28, 1969). The motion for summary affirmance and the stay were both granted by the Court of Appeals on May 1, 1969 (Appendix, *infra*, p. 9) and a writ of certiorari is sought to review that decision.

Reasons for Granting the Writ

1. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich* v. *Selective Service Local Board No. 11.*

The reasons for granting the writ to review this question are identical to the reasons set forth at pp. 5-8 of the petition for certiorari in *Kolden* v. *Selective Service*, No. 1175, this Term. Petitioner respectfully refers the Court to that material.

2. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face or as applied.

The reasons for granting the writ to review this question are identical to the reasons set forth at pp. 13-15 of the petition for certiorari in *Breen* v. *Selective Service*, No. 1144, this Term. Petitioner respectfully refers the Court to that material.

3. Certiorari should be granted to settle the important question whether petitioner's declaration of delinquency, punitive reclassification, and order to report for induction, is authorized by statute or regulation.

The reasons for granting the writ to review this question are identical to the reasons set forth at pp. 9-10 of the petition for certiorari in *Kolden* v. *Selective Service*, No. 1175, this Term. Petitioner respectfully refers the Court to that material.

4. Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment and the Sixth Amendment.

5. Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague and overbroad.

6. Certiorari should be granted to decide whether petitioner's surrender of his Registration Certificate was an act of speech protected by the First Amendment.

The reasons for granting the writ to review the issues in Sections 4, 5 and 6 are identical to the reasons set forth at pp. 15-17 and 21-26 of the petition for certiorari in *Breen* v. *Selective Service*, No. 1144, this Term. Petitioner respectfully refers the Court to that material.

CONCLUSION

For the reasons set forth above, the writ should be granted.

Respectfully submitted,

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156 Fifth Avenue
New York, New York 10010

May 28, 1969

APPENDIX

Petition for Stay

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BROTHER HAROLD WOODS, IVAN JAY KAZEN, DAVID OSHER, MITCHEL COHEN and RICHARD BELL,

Plaintiffs,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 3, Great Neck, New York, *et al.,*

Defendants.

PAUL G. CHEVIGNY, New York, N. Y., *for plaintiff David Osher.*

Appellant David Osher having moved this court for a stay of induction pending his appeal from an order of the District Court for the Eastern District of New York,

IT IS ORDERED THAT

The order of the District Court denying the motion of appellant, David Osher, to extend, beyond January 29, 1969, the preliminary injunction enjoining his induction into the Armed Forces is AFFIRMED.

The order of induction and the mandate of this court are stayed provided that the appellant files a petition for cer-

tiorari with the Clerk of the Supreme Court of the United States within 30 days of the date of this order. Rule 41(b), Federal Rules of Appellate Procedure.

J. Edward Lumbard
Robert P. Anderson
Circuit Judges
Inzer B. Wyatt
District Judge

May 1, 1969

Preliminary Injunction

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 68 C 350

BROTHER HAROLD WOODS, IVAN JAY KAZAN, DAVID OSHER, MITCHEL COHEN and RICHARD BELL, JAMES F. HOWELL and DAVID M. TOBIS,

Plaintiffs,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 3, Great Neck, New York; SELECTIVE SERVICE LOCAL BOARD No. 59, Jamaica, New York; SELECTIVE SERVICE LOCAL BOARD No. 6, Valley Stream, New York; SELECTIVE SERVICE LOCAL BOARD No. 37, Brooklyn, New York; SELECTIVE SERVICE LOCAL BOARD No. 66, Flushing, New York; COLONEL PAUL AKST, Director, NEW YORK CITY HEADQUARTERS SELECTIVE SERVICE SYSTEM; COLONEL WILLIAM H. BOUGHTON, Director, NEW YORK STATE HEADQUARTERS SELECTIVE SERVICE SYSTEM,

Defendants.

Plaintiff David Osher having applied to this Court for an order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining the defendants, or any of them, from inducting him into the United States Army, on November